

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

CELINÉS QUILES-MARCUCCI, et al.,

Plaintiffs,

V.

COOPERATIVA DE AHORRO Y CRÉDITO  
DE JUANA DÍAZ, INC.,

Defendant.

## OPINION AND ORDER

Plaintiffs, Celinés Quiles-Marcucci, her husband, Oscar Guillermo Rosselló-Rodríguez, and their conjugal partnership, bring this action against Defendant, Cooperativa de Ahorro y Crédito de Juana Diaz. (Docket No. 1.) Plaintiffs seek damages for breaches of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34; and Puerto Rico law. (*Id.*) Defendant moves for summary judgment per Federal Rule of Civil Procedure 56(c) (Docket No. 9). Plaintiffs oppose (Docket No. 22); Defendant replies (Docket No. 30).

I.

## **Factual and Procedural Synopsis**

We derive the following facts from the parties' motions, statements of uncontested material facts, and exhibits. (Docket Nos. 9, 10, 19, 22, 28, 30, 31, 33, 36.)

Civil No. 08-1913 (JAF)

-2-

1           Defendant is a small banking company with thirty-two employees  
2 in total, including ten officers and supervisors. (Docket No. 33-3.)  
3 Quiles-Marcucci, born on September 25, 1966, began working for  
4 Defendant as a cashier in 2000. On July 12, 2005, Defendant promoted  
5 her to main cashier and Milagros Quiles became her supervisor. From  
6 July through October 2005, Milagros Quiles disparaged Quiles-  
7 Marcucci's job performance, claimed that she was too old to work as  
8 a cashier, and threatened her with termination on numerous occasions.  
9 (Docket No. 17-2 at 8-12; Docket No. 28-2 at 2.) Natasha Torres-Lugo  
10 ("Torres"), a former coworker of Quiles-Marcucci, stated that she  
11 heard Milagros Quiles occasionally criticize Quiles-Marcucci for her  
12 age from July 2006 through 2007. (Docket No. 28-3 at 2-4.) However,  
13 Torres could not recall the precise dates of the events, and  
14 erroneously insisted that they began when Milagros Quiles started  
15 working for Defendant in July 2006. (*Id.*) Defendant reassigned  
16 Quiles-Marcucci as a document manager and control officer inside its  
17 vault on October 9, 2005, but she continued to work as a cashier in  
18 the cashier's area three or four days each month during periods of  
19 peak customer activity. (Docket No. 17-2 at 22.) Quiles-Marcucci  
20 reached the age of forty on September 25, 2006.

21           On February 22, 2007, Dr. Ramón Rivera-Morales, of the State  
22 Insurance Fund ("SIF"), examined Quiles-Marcucci for an unspecified  
23 emotional condition and discharged her to rest at home. (Docket  
24 No. 17-3.) On May 18, 2007, Dr. Roberto Rinaldi, Quiles-Marcucci's

Civil No. 08-1913 (JAF)

-3-

1 psychologist, sent a letter to Defendant requesting Quiles-Marcucci's  
2 removal from work in the cashier area for reasons of health. (Docket  
3 No. 28-4.) Defendant wrote Rinaldi twice for more information on  
4 Quiles-Marcucci's condition. In a reply letter to Defendant dated  
5 November 6, 2007, Rinaldi explained that Quiles-Marcucci had an  
6 emotional condition which she attributed to "a series of problems  
7 with her immediate supervisor" and felt "harassed and criticized."  
8 (Id.) Despite these difficulties, Quiles-Marcucci was able to  
9 continue working. (Docket No. 19-2 at 3.)

10 Quiles-Marcucci received three official reprimands. On  
11 January 16, 2007, Milagros Quiles reprimanded Quiles-Marcucci for  
12 insubordination and failure to promptly return from lunch break  
13 during a peak period for business. (Docket No. 17-6.) On February 26,  
14 2007, Héctor Valedón, an officer for Defendant, reprimanded Quiles-  
15 Marcucci for an unannounced, extended absence from February 3 through  
16 23, 2007, which coincided with a peak period of bank business on  
17 February 3, and her failure to coordinate with Defendant to ensure  
18 adequate staffing during the peak period. (Docket No. 17-7.) Valedón  
19 noted that Quiles-Marcucci had failed to contact Defendant during her  
20 absence to explain her situation. (Id.) He further noted that the  
21 subsequent note from the SIF at most excused her from work until  
22 February 21, 2007, and did not explain her failure to consult  
23 Defendant in time to cope with a foreseeable influx of customers.  
24 (Id.) On August 13, 2007, Valedón reprimanded Quiles-Marcucci for a

Civil No. 08-1913 (JAF)

- 4 -

1 breach of protocol in failing to report the disappearance of personal  
2 items from her work area, which could have had serious implications  
3 for bank security. (Docket No. 17-8.)

4 On September 4, 2007, Defendant assigned Quiles-Marcucci to work  
5 under the supervision of Valedón. (Docket No. 17-2 at 23.) Defendant  
6 set up a computer terminal inside the vault for her to continue  
7 working as a cashier during the periods of peak customer activity.  
8 (*Id.* at 24.) Quiles-Marcucci continued to report to Milagros Quiles  
9 during these periods. (*Id.*) Quiles-Marcucci also received disparaging  
10 remarks about her work under Valedón's supervision, who believed that  
11 she was malingering her symptoms, said that she was "rowing towards  
12 the opposite side" and could be terminated, and called her old on  
13 numerous occasions. (Docket No. 17-2 at 27-28.) At some point,  
14 Defendant transferred Quiles-Marcucci to work inside an off-site  
15 warehouse. (Docket No. 19-2.) Her duties in retrieving files did not  
16 change with the transfer. (Docket No. 28-3 at 7, 9.) Quiles-Marcucci  
17 briefly mentions an alternative to her last position, but does not  
18 explain how she was qualified for it, what duties it entailed, or why  
19 she preferred the other assignment over her last position. (Docket  
20 No. 19-2 at ¶ 29.)

21 Quiles-Marcucci allegedly received a lesser Christmas bonus and  
22 salary increase than two younger employees at some unspecified time  
23 (Docket No. 19-2 at ¶ 28); Defendant contends that any difference in  
24 compensation was primarily attributable to Quiles-Marcucci's lesser

Civil No. 08-1913 (JAF)

-5-

1 performance relative to her peers (Docket No. 33-3 at 12-13).  
2 Quiles-Marcucci also contends that she complained to Defendant about  
3 the harassment by Milagros Quiles and Valedón in 2006 and 2007  
4 (Docket No. 19-2 at ¶ 30); Defendant contends that she made no such  
5 complaints prior to filing her charges before the Equal Employment  
6 Opportunity Commission ("EEOC") (Docket No. 33-4 at 13).

7 On December 10, 2007, Quiles-Marcucci stopped reporting to work  
8 to receive treatment for her mental and emotional condition. (*Id.* at  
9 33-35.) On December 12, 2007, medical experts at San Juan Capestrano  
10 Hospital diagnosed Quiles-Marcucci with severe mental depression  
11 (Docket No. 28-4); Defendant insists it received no notice of this  
12 diagnosis (Docket No. 33-4). Quiles-Marcucci has been unable to work  
13 because of her depression. (Docket No. 28-3 at 12, 15).

14 On March 11, 2008, Quiles-Marcucci filed a discrimination charge  
15 against Defendant before the EEOC, alleging unequal compensation and  
16 treatment due to sex, age, and disability discrimination, failure to  
17 accommodate her disability, and workplace harassment. (Docket No. 28-  
18 4.) On March 20, 2008, Defendant sent Quiles-Marcucci a letter  
19 terminating her due to her continued absence from work, and asserting  
20 that Defendant had met its legal obligation to keep her position open  
21 for one year from her first treatment by the SIF. (Docket No. 17-5.)  
22 Defendant replaced Quiles-Marcucci with Milton González, a twenty-  
23 four-year-old employee with less seniority. (Docket No. 19-2 at  
24 ¶ 38.) Quiles-Marcucci alleges that Torres and González have also

Civil No. 08-1913 (JAF)

- 6 -

stayed on medical leave for over one year but were not terminated by Defendant. (*Id.* at ¶ 35.) Torres' testimony is silent as to this allegation. (See Docket No. 28-3.) Defendant asserts confidential privilege with respect to its personnel records (Docket No. 33-4 at 18). At the time of her discharge, Quiles-Marcucci was still under treatment by the SIF, which had not cleared her for work. (Docket No. 17-2 at 34-35.)

On August 18, 2008, Plaintiffs commenced this case in federal court. (Docket No. 1.) On April 6, 2009, Defendant moved for summary judgment (Docket No. 9); Plaintiffs opposed on May 18, 2009 (Docket No. 22); Defendant replied on June 11, 2009 (Docket No. 30).

II.

### Summary Judgment under Rule 56(c)

We grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

The movant carries the burden of establishing that there is no genuine issue as to any material fact; however, the burden "may be discharged by showing that there is an absence of evidence to support

Civil No. 08-1913 (JAF)

-7-

1 the non-movant's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325,  
2 331 (1986). The burden has two components: (1) an initial burden of  
3 production, which shifts to the non-movant if satisfied by the  
4 movant; and (2) an ultimate burden of persuasion, which always  
5 remains on the movant. Id. at 331.

6 In evaluating a motion for summary judgment, we view the record  
7 in the light most favorable to the non-movant. Adickes v. S.H. Kress  
8 & Co., 398 U.S. 144, 157 (1970). However, the non-movant "may not  
9 rely merely on allegations or denials in its own pleading; rather,  
10 its response must . . . set out specific facts showing a genuine  
11 issue for trial." Fed. R. Civ. P. 56(e)(2). In rare situations, we  
12 may grant summary judgment sua sponte, provided that discovery has  
13 sufficiently progressed to determine relevant facts and the target  
14 has at least ten days' notice to contest the impending judgment.  
15 Stella v. Town of Tewksbury, 4 F.3d 53, 55-56 (1st Cir. 1993).

### 16 III.

#### 17 Analysis

##### 18 A. Statute of Limitations

19 Defendant contends that the relevant statute of limitations bars  
20 all claims under the ADA and ADEA. (Docket No. 9.) Plaintiffs counter  
21 that their claims met the 300-day limit. (Docket No. 22.)

22 In Puerto Rico, a plaintiff under the ADA must file a charge  
23 with either the EEOC or the Puerto Rico Anti-Discrimination Unit  
24 ("ADU") within 300 days of an illegal employment action. 42 U.S.C.

Civil No. 08-1913 (JAF)

-8-

§ 2000e-5(e) (1); 29 C.F.R. § 1601.74. However, as to claims for hostile work environment, the "continuing violation doctrine" allows a plaintiff to incorporate allegations that predate the limitations period if they "are part of the same unlawful employment practice and at least one act falls within the time period." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117, 122 (2002).

In the instant case, as Plaintiffs filed their charge with the EEOC on March 11, 2008, the 300-day period bars all claims arising from employment practices predating May 16, 2007. The only exception relates to continual workplace abuse motivated by discrimination which commenced prior to, but continued into, the 300-day period. See Morgan, 536 U.S. at 122. Therefore, we need only address employment actions that have occurred since May 16, 2007, such as Defendant's response to Rinaldi's letter dated May 18, 2007, and Quiles-Marcucci's discharge on March 20, 2008, unless the conduct relates to a hostile work environment targeting Quiles-Marcucci for her disability or age.

**B. Claims under ADA**

Defendant argues that Plaintiffs cannot establish their claims under the ADA as a matter of law. (Docket No. 9.)

**1. Adverse Employment Action**

To establish a claim for an adverse employment action under the ADA, a plaintiff must prove that she was (1) disabled under the ADA, but (2) "able to perform, with or without reasonable accommodation,

Civil No. 08-1913 (JAF)

-9-

1 the essential functions of her job," and (3) "discharged or adversely  
2 affected, in whole or in part, because of her disability." Orta-  
3 Castro v. Merck, Sharp & Dohme Quimica P.R., Inc., 447 F.3d 105, 111  
4 (1st Cir. 2006). "A disability under the ADA is defined as (1) a  
5 physical or mental impairment that substantially limits one or more  
6 of a person's major life activities; (2) a record of having such an  
7 impairment; or (3) being regarded as having such an impairment."  
8 Sánchez-Figueroa v. Banco Popular de P.R., 527 F.3d 209, 214 (1st  
9 Cir. 2008) (citing 42 U.S.C. § 12102(2)). The impairment must have  
10 permanent or long-term effect "to be considered substantially  
11 limiting within the meaning of the ADA." Id. at 214-15 (citing Toyota  
12 Motors Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002)).

13 First, Quiles-Marcucci has adduced no evidence of a long-term  
14 impairment prior to Rinaldi's letter to Defendant dated November 6,  
15 2007, which explained the need to move Quiles-Marcucci from her  
16 previous position on account of her stress. (Docket No. 28-4 at 4.)  
17 Although Quiles-Marcucci sought treatment on February 22, 2007, the  
18 SIF discharged her to rest at home without diagnosis. (Docket No. 17-  
19 3.) Similarly, Rinaldi's note to Defendant dated May 18, 2007,  
20 requested that Defendant move Quiles-Marcucci away from the cashier's  
21 area without specifying a reason. (Docket No. 28-4.) Read in the  
22 light most favorable to Quiles-Marcucci, the record suggests a long-  
23 term impairment only as of November 6, 2007, which furnishes the  
24 basis for a disability. Sánchez-Figueroa, 527 F.3d at 214.

Civil No. 08-1913 (JAF)

-10-

1           At the same time, Defendant did not perceive Quiles-Marcucci to  
2 be disabled; on the contrary, Valedón believed that she was  
3 falsifying her symptoms. (Docket No. 17-2 at 27-28; see Docket  
4 No. 17-7.) Defendant repeatedly sought clarification from Quiles-  
5 Marcucci's doctors as to her condition. (Docket No. 33-4 at 12.)

6           As the record suggests no disability before November 6, 2007,  
7 the only employment actions that could be attributed to disability  
8 discrimination are Quiles-Marcucci's lesser compensation at  
9 Christmastime in 2007 and her termination in March 2008. Sánchez-  
10 Figueroa, 527 F.3d at 214. Nevertheless, Quiles-Marcucci suffered  
11 from severe mental handicaps at the time of her termination (Docket  
12 No. 28-3 at 12, 15), had not reported for work for three months prior  
13 to her termination, insists that she is incapable of working (Docket  
14 No. 19 at 16), and has not been cleared for work by the SIF (Docket  
15 No. 17-2 at 34-35). Therefore, Quiles-Marcucci cannot show that she  
16 was able to perform the essential functions of her position.  
17 Accordingly, she has no case for adverse employment action for  
18 disability discrimination. See Orta-Castro, 447 F.3d at 111.

19           **2. Hostile Work Environment**

20           To establish a claim for a hostile work environment due to  
21 disability discrimination, a plaintiff must show "that [s]he was  
22 (1) disabled, (2) that [s]he was subjected to a hostile environment,  
23 and (3) that the hostility was directed at [her] because of [her]  
24 disability." Quiles-Quiles v. Henderson, 439 F.3d 1, 5 (1st Cir.

Civil No. 08-1913 (JAF)

-11-

1       2006). To be deemed hostile, a workplace must have been "permeated  
2 with discriminatory intimidation, ridicule, and insult that [was]  
3 sufficiently severe or pervasive to alter the conditions . . . of  
4 [the plaintiff's] employment and create an abusive working  
5 environment." Id. at 7 (quoting Harris v. Forklift Sys., Inc., 510  
6 U.S. 17, 21 (1993)) (internal quotation marks omitted). Relevant  
7 factors include "the severity of the conduct, its frequency, and  
8 whether it unreasonably interfered with the victim's work  
9 performance." Id. (citing Harris, 510 U.S. at 23).

10       As aforementioned, Quiles-Marcucci has only established her  
11 disability as of November 6, 2007. The relevant inquiry, then, is  
12 whether a hostile environment existed in the month-long period  
13 between Rinaldi's letter to Defendant and her discontinuation of work  
14 on December 10, 2007. The submissions do not suggest a daily pattern  
15 of abuse during this brief span. Although Quiles-Marcucci asserts in  
16 her sworn statement that Milagros Quiles threatened her daily with  
17 termination due to her illness (Docket No. 19-2 at ¶ 26), this  
18 statement postdates and conflicts with her deposition testimony, in  
19 which she blamed Milagros Quiles only for calling her old during July  
20 through October 2005 (Docket No. 17-2 at 7-12). We need not credit  
21 self-serving sworn statements which are inconsistent with prior  
22 deposition testimony. See Orta-Castro, 447 F.3d at 110. Furthermore,  
23 Quiles-Marcucci claims that Defendant transferred her to an isolated  
24 warehouse for significant periods of time prior to her last day of

Civil No. 08-1913 (JAF)

-12-

1 work which, if true, directly contradicts her allegations against  
2 Milagros Quiles in late 2007. (See Docket No. 19-2 at ¶¶ 17-19, 26.)  
3 Accordingly, Quiles-Marcucci has failed as a matter of law to prove  
4 a case for workplace harassment due to her disability. See Quiles-  
5 Quiles, 439 F.3d at 5 (requiring severe and pervasive abuse).

6           **3. Retaliation**

7           To prove retaliation due to a plaintiff's complaint against, or  
8 involvement in investigating, disability discrimination, she must  
9 show "that (1) [s]he engaged in protected conduct; (2) [s]he  
10 experienced an adverse employment action; and (3) there was a causal  
11 connection between the protected conduct and the adverse employment  
12 action." Id. at 8. Protected conduct includes opposition to  
13 disability discrimination and filing a charge against such conduct.  
14 42 U.S.C. § 12203(a). "The adverse employment action requirement may  
15 be satisfied by showing the creation of a hostile work environment or  
16 the intensification of a pre-existing hostile environment." Quiles-  
17 Quiles, 439 F.3d at 8. "[T]he causation element may be established by  
18 evidence that there was a temporal proximity between the behavior in  
19 question and the employee's complaint." Id.

20           In the case at bar, Quiles-Marcucci contends that Defendant  
21 retaliated against her by (1) making negative statements because of  
22 her complaints against harassment and discrimination, and  
23 (2) terminating her because of her discrimination charge before the  
24 EEOC. (Docket No. 22 at 13.) We note that Quiles-Marcucci also

Civil No. 08-1913 (JAF)

-13-

1 requested accommodation from Defendant on May 18, 2007 (Docket  
2 No. 28-4), which could have been the basis for retaliatory harassment  
3 or discharge.

4 First, in support of her claim for retaliatory statements in  
5 response to her complaints, Quiles-Marcucci refers to her own sworn  
6 statement and Torres's deposition testimony. (Id.; see Docket No. 19  
7 at ¶ 10.) As noted above, we may disregard Quiles-Marcucci's sworn  
8 statement due to its discrepancies with her prior deposition. See  
9 supra part III-B-2. Torres' testimony is ambiguous as to the  
10 frequency, duration, and severity of negative comments by Valedón and  
11 Milagros Quiles, as well as the time period in which such comments  
12 were supposedly made. (See Docket No. 28-3 at 8-9.) Without a  
13 temporal reference or indication of frequency and severity of  
14 Defendant's conduct, Plaintiffs cannot establish a causal  
15 relationship between the statements and Quiles-Marcucci's complaints,  
16 and hence no claim exists for retaliation by means of harassment.  
17 See Quiles-Quiles, 439 F.3d at 8.

18 Second, with respect to the claim for retaliatory discharge,  
19 Defendant argues that it must prevail as it has a legitimate, non-  
20 discriminatory reason for terminating Quiles-Marcucci. (Docket No. 9  
21 at 13.) Under the McDonnell Douglas burden-shifting framework,

22 a plaintiff must first establish a prima facie  
23 case of discrimination. The burden then shifts  
24 to the employer to articulate a legitimate,  
25 nondiscriminatory reason for its employment  
26 action. If the employer meets this burden, the

Civil No. 08-1913 (JAF)

-14-

1                   presumption of intentional discrimination  
2 disappears, but the plaintiff can still prove  
3 disparate treatment by, for instance, offering  
4 evidence demonstrating that the employer's  
5 explanation is pretextual.

6                   Raytheon Co. v. Hernandez, 540 U.S. 44, 49 n.3 (citing  
7                   McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)) (internal  
8 citation omitted). As Quiles-Marcucci's termination swiftly followed  
9 her complaint before the EEOC, there is a strong inference of causal  
10 relationship between the two events and, thus, Plaintiffs could  
11 establish a *prima facie* claim for retaliatory discharge. See 42  
12 U.S.C. § 12203(a); Quiles-Quiles, 439 F.3d at 8.

13                  Defendant argues, however, that it discharged Quiles-Marcucci  
14 because she stopped working and Defendant could terminate workers on  
15 disability leave upon the expiration of a legally-prescribed one-year  
16 period. (Docket No. 9 at 13-14.) Plaintiff contends that (1) the  
17 cited reason is pretextual, as other workers who had overstayed their  
18 medical leave were not discharged (Docket No. 22), and (2) the  
19 twelve-month period had not elapsed at the time of her termination,  
20 as it should have been re-computed from the commencement of a second  
21 work-related "accident" on December 10, 2007 (Docket No. 36).

22                  Under Puerto Rico law, employers must reserve the positions of  
23 disabled workers for one full year before terminating them. 11  
24 L.P.R.A. § 203(q) (2007). This period computes "from the date of the  
25 onset of the disability." § 203(q)(1). The period "cannot be  
26 interrupted in any way." See Alvira-Cintrón v. SK & F Labs. Co., 142

Civil No. 08-1913 (JAF)

-15-

1 P.R. December. 803 (1997) (interpreting twelve-month period in 11  
2 L.P.R.A. § 7) (Docket No. 37); see also id. (Corrada del Río, J.,  
3 concurring) (extending same reasoning to reserve period in 11  
4 L.P.R.A. § 203(q)). Terminating workers for failing to return to  
5 work after the end of this statutory period rebuts liability under  
6 the ADA. Corujo-Martí v. Triple-S, Inc., 519 F. Supp. 2d 201, 205-06  
7 (D.P.R. 2007).

8 Quiles-Marcucci sought treatment by the SIF for the first time  
9 on February 22, 2007. (Docket No. 17-3.) Defendant terminated her by  
10 letter on March 20, 2008, noting that more than one year had elapsed  
11 since her initial treatment and she remained on indefinite medical  
12 leave. (Docket No. 17-5.) Even if we were to accept that Defendant  
13 has failed to discharge other workers who stayed on medical leave  
14 past the one-year statutory period (see Docket No. 22 at 13), such  
15 inconsistent treatment does not by itself render Defendant's  
16 proffered excuse pretextual, see Freadman v. Metro. Prop. & Cas. Ins.  
17 Co., 484 F.3d 91, 101 (1st Cir. 2007) (refusing to find pretext where  
18 defendant deviated from its disciplinary policy). On the contrary,  
19 Defendant had been deprived of Quiles-Marcucci's services for over  
20 three months, and Quiles-Marcucci was incapable of returning to work  
21 (see Docket No. 17-2 at 34-35). Lastly, Plaintiffs' belated attempt  
22 to invoke, without evidence, a separate work-related injury on  
23 December 10, 2007, to recompute the one-year period must fail. (See

Civil No. 08-1913 (JAF)

-16-

1 Docket No. 36.) Therefore, Plaintiffs cannot establish a claim for  
2 retaliatory discharge. See Raytheon Co., 540 U.S. at 49 n.3.

3 Third, a claim could lie under the ADA for retaliation due to a  
4 plaintiff's request for reasonable accommodation. Wright v. CompUSA,  
5 Inc., 352 F.3d 472, 477-78 (1st Cir. 2003). We note, however, that  
6 the preceding reasoning pertaining to retaliatory harassment and  
7 discharge applies, mutatis mutandis, to foreclose Plaintiffs' claim  
8 for retaliation for requesting accommodation.

9       **4. Failure to Accommodate**

10       To establish a claim for a defendant's failure to accommodate a  
11 plaintiff's disability, a plaintiff must show "that (1) [s]he was  
12 disabled within the meaning of the ADA, (2) [s]he was able to perform  
13 the essential functions of the job with or without a reasonable  
14 accommodation, and (3) [that the defendant], despite knowing of [her]  
15 disability, did not reasonably accommodate it." Tobin v. Liberty Mut.  
16 Ins. Co., 433 F.3d 100, 107 (1st Cir. 2005). As noted above, the  
17 record establishes Quiles-Marcucci's disability only after  
18 November 6, 2007. Rinaldi's letter of May 18, 2007, merely requested  
19 that Defendant remove Quiles-Marcucci from working in the cashier's  
20 area of the bank without suggesting that she suffered from a long-  
21 term ailment. (Docket No. 28-4.) Therefore, the issue is whether  
22 Defendant made reasonable accommodations for Quiles-Marcucci between  
23 November 6, 2007, and her departure on December 10, 2007.

Civil No. 08-1913 (JAF)

-17-

1           As of September 4, 2007, Quiles-Marcucci had been transferred to  
2 work inside the vault (Docket No. 17-2 at 23-24), and Defendant later  
3 assigned her to work at a distant warehouse (Docket No. 19-2). While  
4 these accommodations may not be ideal, without a stronger inference  
5 of an illegal motive, we refuse to second-guess Defendant's business  
6 decision in resorting to these two locations to comply with Rinaldi's  
7 recommendations. See Petitti v. New Eng. Tel. & Tel. Co., 909 F.2d  
8 28, 31 (1st Cir. 1990) (refusing to second-guess defendant's  
9 personnel decisions to find pretext). We note that Defendant has a  
10 small operation with thirty-two employees in total, only twenty-two  
11 of whom are in non-managerial positions. (Docket No. 33-3 at 12.)  
12 Therefore, Defendant had limited options in reassigning Quiles-  
13 Marcucci to satisfy her needs. While Quiles-Marcucci refers to a  
14 possible alternative, she does not explain why this other position  
15 would have been preferred over her last assignment. (See Docket No.  
16 19-2 at ¶ 29.) Lastly, while Quiles-Marcucci primarily blames  
17 Milagros Quiles for her disability (Docket No. 19-2), Defendant need  
18 not reassign her to another supervisor as a reasonable accommodation.  
19 See EEOC Notice No. 915.002 (October. 17, 2002) (Question 33). As  
20 Plaintiffs cannot show that Defendant's accommodation was  
21 unreasonable, they cannot prove a case for failure to accommodate.  
22 See Tobin, 433 F.3d at 107.

Civil No. 08-1913 (JAF)

-18-

1           C.    Claims under ADEA2           Defendant argues that Plaintiffs cannot establish their claims  
3           under the ADEA as a matter of law. (Docket No. 9.)4           1.    Age Discrimination5           The ADEA creates a claim against employers for age  
6           discrimination. 29 U.S.C. §§ 623(a), 626(c). In the absence of direct  
7           proof of discriminatory motive, a plaintiff must show that she  
8           (1) was at least forty years old; (2) was qualified for her position;  
9           (3) suffered an adverse employment action; and (4) that the benefit  
10          or position denied to the plaintiff was given to a younger person  
11          with similar qualifications. Arroyo-Audifred v. Verizon Wireless,  
12          Inc., 527 F.3d 215, 218-19 (1st Cir. 2008).13          Quiles-Marcucci alleges that Defendant discriminated against her  
14          on the basis of age by "drastically decreasing all of her functions  
15          and duties" and demoting her from her prior position. (Docket No. 1  
16          at 4.) The statute of limitations limits our analysis to changes to  
17          her position after May 16, 2007. See supra part III-A. Prior to her  
18          discontinuation of work on December 10, 2007, Quiles-Marcucci's  
19          position as a document management and control officer inside the  
20          vault did not change, except insofar as she was transferred to the  
21          warehouse at some point. (Docket No. 19-2 at ¶¶ 5, 17.) She continued  
22          to work as a cashier notwithstanding her position. (Id. at ¶¶ 15, 17,  
23          20.) Defendant did not significantly alter Quiles-Marcucci's tasks in

Civil No. 08-1913 (JAF)

-19-

1 organizing and retrieving documents in moving her from the vault to  
2 the warehouse. (Docket No. 28-3 at 7, 9.)

3 Quiles-Marcucci also asserts that Defendant decided to pay  
4 greater Christmas bonuses and salary increases to other, younger  
5 employees, but does not specify the time at which this disparity  
6 occurred. (Docket No. 19-2 at ¶ 28.) Quiles-Marcucci asserts that the  
7 bulk of Defendant's discriminatory conduct occurred in 2005 (Docket  
8 No. 28-2 at 2), but the statute of limitations bars claims arising  
9 from conduct prior to May 16, 2007, see supra part III-A.  
10 Furthermore, Quiles-Marcucci presents no evidence that the other  
11 employees had similar qualifications; indeed, Defendant attests that  
12 these other workers outperformed Quiles-Marcucci (Docket No. 33-3 at  
13 12-13). Therefore, Quiles-Marcucci cannot attribute any wage  
14 differential to her status as a protected individual over the age of  
15 forty. Accordingly, Plaintiffs cannot establish a claim for age  
16 discrimination on the basis of demotion, drastic change in duties, or  
17 difference in compensation. See Arroyo-Audifred, 527 F.3d at 218-19.

18 **2. Hostile Work Environment**

19 The ADEA also provides a claim for a hostile work environment  
20 that discriminates against a plaintiff on the basis of age. Rivera-  
21 Rodríguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 24 (1st Cir.  
22 2001). To establish such a claim, a plaintiff must show that the  
23 severity and pervasiveness of the harassment were sufficient to be  
24 objectively abusive, and that she subjectively perceived the

Civil No. 08-1913 (JAF)

-20-

1 environment to be hostile. Id. (citing Landrau-Romero v. Banco  
2 Popular de P.R., 212 F.3d 607, 613 (1st Cir. 2000)). "When assessing  
3 whether a workplace is a hostile environment, courts look to the  
4 totality of the circumstances, including the frequency of the  
5 discriminatory conduct; its severity; whether it is threatening or  
6 humiliating, or merely an offensive utterance; and whether it  
7 unreasonably interferes with the employee's work performance." Id.  
8 (citing Landrau-Romero, 212 F.3d at 613). In general, verbal abuse  
9 directed at a plaintiff's poor work performance, rather than her age,  
10 does not violate the ADEA. Young v. Will County Dep't of Pub. Aid,  
11 882 F.2d 290, 294 (7th Cir. 1989).

12 As Quiles-Marcucci turned forty on September 25, 2006, the issue  
13 is whether there was a pattern of abuse that commenced after that  
14 date which continued into the 300-day period beginning May 16, 2007.  
15 See 29 U.S.C. § 631(a) (defining threshold age of forty); Morgan, 536  
16 U.S. at 117, 122 (opining that hostile environment could be  
17 continuing violation); supra part III-A.

18 With respect to allegations of verbal abuse by Milagros Quiles,  
19 Quiles-Marcucci's own testimony suggests that the bulk of such  
20 disparagement took place in 2005, before she attained the age of  
21 forty. (Docket No. 17-2 at 8-12.) In an attempt to contradict their  
22 own statements, Plaintiffs point to Torres' testimony that Milagros  
23 Quiles verbally abused Quiles-Marcucci in 2006. (Docket No. 28-3 at  
24 2-4.) However, Torres also believed that Milagros Quiles did not

Civil No. 08-1913 (JAF)

-21-

begin working for Defendant until July 2006 (id.), which contradicts Quiles-Marcucci's testimony that Milagros Quiles was her supervisor in 2005 (Docket No. 17-2 at 8-12). Torres' testimony is otherwise devoid of reference to the frequency of such comments and does not suggest that frequent, significant abuse occurred after September 25, 2006. (See Docket No. 28-3 at 2-4.)

Although Quiles-Marcucci also asserts that Valedón disparaged her for her age, he did not supervise her until September 4, 2007 (Docket No. 17-2 at 23-24), thus leaving a brief window of opportunity for verbal abuse prior to December 10, 2007, especially in view of her duties at the warehouse (Docket No. 19-2). Moreover, Torres's testimony sheds little light on the combined abuse by Valedón and Milagros Quiles. (See Docket No. 28-3 at 8-9.) Torres could recall only a few encounters between them and Quiles-Marcucci, and these interactions, while rude, were not threatening and appeared to be directed primarily at Quiles-Marcucci's poor performance and their suspicion that her ailments were false. (See Docket Nos. 17-6, 17-7, 17-8.)

Furthermore, Quiles-Marcucci insists that she was able to work unimpeded (Docket No. 19-2 at ¶ 8), and that she voluntarily ceased work on December 10, 2007, to seek medical attention (id. at ¶ 23). Accordingly, Plaintiffs cannot establish that Defendant's age-related abuse was sufficiently frequent, severe, threatening, or disruptive

Civil No. 08-1913 (JAF)

-22-

1 of working conditions to sustain their claim. See Rivera-Rodríguez,  
2 265 F.3d at 24; Young, 882 F.2d at 294.

3 **3. Retaliation**

4 Quiles-Marcucci avers that Defendant retaliated against her in  
5 response to her complaints to Defendant and her charge before the  
6 EEOC. (Docket No. 1.) A plaintiff may sue her employer for  
7 retaliation against her opposition to age discrimination. 29 U.S.C.  
8 § 623(d). To establish retaliation, a plaintiff must show that  
9 (1) she opposed age discrimination at work; (2) she suffered an  
10 adverse employment action; and (3) there is a causal connection  
11 between the protest and the adverse action. Id.; Ramírez Rodríguez v.  
12 Boehringer Ingelheim Pharms., Inc., 425 F.3d 67, 84 (1st Cir. 2005).

13 Our previous analysis of retaliatory harassment and discharge  
14 under the ADA with respect to Plaintiffs' complaint to Defendant  
15 against Milagros Quiles and Valedón and their charge before the EEOC  
16 applies, mutatis mutandis, with equal force here. See supra part III-  
17 B-3. Defendant's alleged acts and omissions subsequent to Plaintiff's  
18 complaints on the basis of disability and age discrimination are  
19 identical for the purposes of both the ADA and ADEA. See id.  
20 Moreover, the rules pertaining to Defendant's potential liability  
21 under the ADA and ADEA are virtually the same. Compare Quiles-Quiles,  
22 439 F.3d at 8 with Ramírez Rodríguez, 425 F.3d at 84. Accordingly,  
23 Plaintiffs cannot establish a claim for retaliation under the ADEA.  
24 See Ramírez Rodríguez, 425 F.3d at 84.

Civil No. 08-1913 (JAF)

-23-

1           **4. Disparate Impact**

2           Plaintiffs briefly mention the grounds in their complaint for a  
3           claim for disparate impact under the ADEA. (See Docket No. 1.) Under  
4           the ADEA, a plaintiff could state a claim for disparate impact if she  
5           could point to specific employment practices that lead to statistical  
6           disparities between people over the age of forty and those below the  
7           protected age. See Meacham v. Knolls Atomic Power Lab., 128 S. Ct.  
8           2395, 2405 (2008). Defendant does not address this claim in its  
9           motion for summary judgment. (See Docket No. 9.)

10           It appears from the record, however, that Plaintiffs never  
11           exhausted this claim by incorporating it into their charge before the  
12           EEOC. (See Docket No. 28-4.) Moreover, neither party has adduced  
13           facts to suggest the existence of policies or general practices by  
14           Defendant which uniformly discriminate against workers over the age  
15           of forty. (See generally Docket Nos. 10, 19, 31.) Therefore, we order  
16           Plaintiffs to explain why we should not grant summary judgment  
17           against them on their claim for disparate impact under the ADEA.

18           **IV.**19           **Conclusion**

20           Accordingly, we hereby **GRANT** Defendant's motion for summary  
21           judgment (Docket No. 9) and **DISMISS** all federal claims, except for  
22           disparate impact under the ADEA, **WITH PREJUDICE**. We **ORDER** Plaintiffs  
23           to **SHOW CAUSE** by **July 17, 2009**, as to why summary judgment is

Civil No. 08-1913 (JAF)

-24-

1 inappropriate against their remaining federal claim for disparate  
2 impact under the ADEA.

3 **IT IS SO ORDERED.**

4 San Juan, Puerto Rico, this 30<sup>th</sup> day of June, 2009.

5 S/José Antonio Fusté  
6 JOSE ANTONIO FUSTE  
7 Chief U.S. District Judge